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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 1242

KENNETH A. GREEN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Illinois.

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KENNETH A. GREEN,
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v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Illinois.

Kenneth A. Green, Petitioner, appearing Pro Se, respectfully prays that a writ of certiorari issue to review the judgments of the Supreme Court of Illinois, and of the Appellate Court of Illinois, the last of which was entered on January 11, 1967.

OPINIONS BELOW.

The first judgment of the Illinois Supreme Court was not reported, and is appended hereto as Appendix A, page 27.

The judgment of the Illinois Appellate Court, Fourth District, is reported at 74 Ill. App. 2d 308, 218 N. E. 2d 840, and is appended hereto as Appendix B, page 28.

The final and last judgment of the Illinois Supreme Court was not reported, and is appended hereto as Appendix C, page 34.

JURISDICTION.

There were three appeals in this case. The judgment on the final appeal was entered by the Illinois Supreme Court on January 11, 1967 (Appendix C, pg. 34).

There were no orders for a rehearing, and no extensions were sought or allowed.

The jurisdiction of this Court is invoked under the provisions of U. S. Code, Title 28, Section 1257, and Supreme Court Rule 19, providing for certiorari when federal questions have arisen in state courts.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are several, and are as follows:

I.

Where the Illinois Constitution provides that appeals from the final judgments of circuit courts shall lie directly to the Illinois Supreme Court in cases involving questions arising under the Constitutions of the United States or of the State of Illinois, and where the Rules of the Illinois Supreme Court make identical provisions, and where, in a criminal case, the defendant raised in the trial court and on his first appeal to the Supreme Court questions arising under the Constitutions of the United States and the State of Illinois, has not due process and equal protection of the law been denied the defendant where he appealed to the Illinois Supreme Court

and that Court refused to entertain the appeal and transferred the case, without opinion, to an inferior court, viz., the Appellate Court?

II.

Where, in a criminal case, after transfer to the Appellate Court, the Appellate Court considered and passed on federal and state constitutional questions, and where constitutional questions are required, by the Illinois Constitution and Court Rules, to be passed on only by the Supreme Court, has not the deprivation of the constitutional and statutory right of consideration of those questions by the state's highest court denied the defendant of due process and equal protection of the law?

III.

Where the rules of the Illinois Supreme Court provide that an appeal from the Appellate Court to the Supreme Court lies as a matter of right to the Supreme Court where questions under the Constitution of the United States or of the State of Illinois arise for the first time as a result of the action of the Appellate Court, and where constitutional questions are in fact decided for the first time by the Appellate Court, has not the defendant in a criminal case been denied due process and equal protection of the law where, upon perfecting an appeal to the Supreme Court on these grounds, the Supreme Court dismisses the appeal without opinion?

IV.

Where the Rules and decisions of the Illinois Supreme Court provide that before a motion can be filed in that Court the party filing the motion must make proof that a copy of the motion has been served on the opposing party at least 24 hours before the motion is filed, and where such motion is filed with the clerk of the Supreme Court

two days before serving a copy on the opposing party, did not the Supreme Court deprive the opposing party, defendant in this case, of due process and equal protection of the law when it entertained and allowed the motion, despite the violation of said Rule and decisions?

V.

Is there not double jeopardy (triple jeopardy) where there is one alleged theft of the sum of $15,000; and where the defendant is charged with the violation of only one statute, involving only one act, one owner, and the same property; and where the indictment charges the same offense three times, in three counts which are not pleaded in the alternative, but pleaded as three separate and distinct acts; and where all three of the counts are presented to the jury as separate and distinct acts, charging, cumulatively, the theft of $45,000?

VI.

On the set of facts set forth in V above, has not the defendant been deprived of a fair trial and due process of law?

VII.

Is there not double jeopardy (triple jeopardy) when the trial judge presents all three of said counts to the jury without the explanation that the defendant can be found guilty on only one of the counts, and where the trial judge delivers to the jury three separate forms of verdict covering the three counts, and where, upon the jury returning three verdicts of guilty, the trial judge records all three verdicts and enters judgment on the three verdicts, finding the defendant guilty of the theft of $45,000 where only $15,000 is involved?

VIII.

Are not these actions prejudicial in the eyes of the jury, and did they not deprive the defendant of a fair trial and

due process of law, and are they not beyond any claim of harmless error?

IX.

On the same theory, is there not double jeopardy when the alleged forgery of one release is involved, and where the defendant is charged in two counts, which are not pleaded in the alternative, with the forgery of said release, and is charged twice with the violation of the same statute, involving the same act, the same release, and the same prosecuting witness; and where the trial judge does not present the two counts to the jury in the alternative; and where the trial judge records and enters guilty judgments on the two verdicts involving the one alleged offense? And is there not a deprivation of due process?

X.

And where the identical things set forth in IX above are done with regard to the alleged forgery of a draft, is there not double jeopardy? And is there not a deprivation of due process?

CONSTITUTIONS AND STATUTES INVOLVED.

Some of the statutes involved are lengthy, so all of the constitutional and statutory provisions are set forth in the Appendix. For the sake of clarity and convenience, brief reference is here made concerning the contents of these provisions.

U. S. Constitution, Amendment V, Appendix E, pg. 36. (No person shall be twice put in jeopardy for the same offense.)

U. S. Constitution, Amendment XIV, Appendix F, pg. 37. (No person shall be deprived of life, etc., without due process of law or be denied equal protection.)

Illinois Constitution, Article II, Section 10 (Illinois Revised Statutes, 1965, Volume 1, pg. 11), Appendix G, pg. 37. (No person shall be twice put in jeopardy for the same offense.)

Illinois Constitution, Article VI, Section 5 (b) (Illinois Revised Statutes, 1965, Volume 1, pg. 18). Appendix H, pg. 37. (Appeals from trial court to Illinois Supreme Court lie as a matter of right when questions arise under United States Constitution or Illinois Constitution.)

Illinois Supreme Court Rule 28-1 (Illinois Revised Statutes, 1965, Chapter 110, Section 101.28-1, Vol. 2, pg. 1556). Appendix I, pg. 38. (Appeals from trial courts shall be taken directly to the Supreme Court in cases involving the constitutions of the United States or the State of Illinois.)

Illinois Supreme Court Rule 32 (3) (a) (Illinois Revised Statutes, 1965, Chapter 110, Section 101.32 (3) (a), Volume 2, pg. 1558). Appendix J, pg. 38 (Appeals from the Illinois Appellate Court shall lie to the Supreme Court as a matter of right where the Appellate Court has decided a question which arises for the first time under the constitutions of the United States or the State of Illinois.)

Illinois Supreme Court Rule 49 (Illinois Revised Statutes, 1965, Chapter 110, Section 101.49, Volume 2, pg. 1565). Appendix K, pg. 38. (Before a motion can be filed for consideration of Illinois Supreme Court the movant must make proof that a copy of the motion has been served on the opposing party at least 24 hours before filing in the Supreme Court.)

Illinois Statutes, Chapter 38, Section 16-1, Appendix M, pg. 41, defining theft. (Statute too lengthy to digest. Please see appendix.)

Illinois Statutes, Chapter 38, Section 17-3, Appendix N, pg. 41, defining forgery. (Statute too lengthy to digest. Please see appendix.)

STATEMENT OF THE CASE.

This case involves three separate appeals involving the same case, and six or more constitutional points.

The statement shall be as brief and concise as possible. Since the record is voluminous, for the convenience of the Court, parenthetical reference will be made to the places in the Record and the Abstract of the trial court proceedings where the substantial matters stated can be found. Nine copies of the Abstract of the proceedings have been filed in this case.

The Petitioner here was defendant in the trial court, and appellant in all three appeals. He shall be referred to herein as the defendant.

The indictment, a brief portion of the testimony in the trial court, and the verdicts are involved in the constitutional questions raised, and they must briefly be referred to.

The defendant was an attorney who practiced in Illinois for 23 years. He was employed by one Thomas Wickham to represent him in a personal injury action, and suit was filed. Thereafter Mr. Wickham moved to Florida. Settlement negotiations followed and Mr. Wickham authorized the defendant to settle the case the way defendant thought the case should be settled, that he was leaving the settlement up to the defendant (Abstract pg. 15). Settlement was made at $15,000. The defendant, who was in Illinois, telephoned Mr. Wickham in Florida six times, attempting to make arrangements to meet with Mr. Wickham in Florida so that settlement could be made (Abstract pgs. 15, 16). Before the defendant was able to make the trip to Florida, Mr. Wickham advised defendant that he was coming to Illinois. Defendant asked Wickham to come to his office as soon as he arrived in Illinois, and Wickham agreed to do so (Abstract pg. 16).

There is a dispute as to whether Wickham ever came to defendant's office (Abstract pgs. 16, 30, 31). The next defendant heard from Wickham was when another attorney phoned defendant and advised him that Wickham was demanding $13,500 of the $15,000, and that defendant take only ten per cent as his fee (Abstract pgs. 16, 17). The parties never met thereafter, and settlement was not made.

State's Exhibits 8 and 9, being a copy of defendant's bank balance sheet, shows the $15,000.00 to be intact (Abstract pgs. 29 and 30).

The indictment followed. Due to the constitutional questions raised, the contents of the indictment are briefly referred to.

The indictment consists of seven counts, all of which are pleaded as separate offenses, and none of which are pleaded in the alternative. The indictment appears at Abstract pages 2 to 5, and Counts V, VI and VII appear in Appendix L of this Petition, pg. 39.

Count I charges that the defendant forged the signatures of Thomas Wickham and his wife to a release which stated a consideration of $15,000.00 in violation of section 17-3 of the Illinois Criminal Code. Count II refers to the same release, and charges that the defendant committed forgery in delivering the release to attorneys for United States Fidelity and Guaranty Company, in violation of the same statute, section 17-3.

Count III charges that the defendant forged the endorsements of Thomas Wickham and his wife to a draft in the amount of $15,000.00 in violation of section 17-3 of the Illinois Criminal Code. Count IV refers to the same draft, and charges that the defendant committed forgery in delivering the draft to the National Bank of Mattoon, Illinois, in violation of the same statute, section 17-3.

At the trial only one release was introduced in evidence, it being the one release showing a consideration in the amount of $15,000.00 (Abstract pg. 27).

Counts V, VI and VII charge that the defendant committed the offense of theft with relation to the sum of $15,000.00, property of Thomas Wickham. The only difference between the three charges is that Count V charges that the defendant exerted unauthorized control over the $15,000.00, intending to deprive Thomas Wickham permanently of the use or benefit of the property; Count VI charges that the defendant exerted unauthorized control over the $15,000.00 and used the property in such manner as to deprive Thomas Wickham permanently of the use or benefit of the property; Count VII charges that the defendant exerted unauthorized control over the $15,000.00 and used the property knowing that such use probably would deprive Thomas Wickham permanently of the use or benefit of the property.

All three of these counts charge a violation of the same statute, Section 16-1 of the Illinois Criminal Code, which defines theft.

At the trial only one draft was introduced in evidence, it being the one draft in the amount of $15,000.00 (Abstract pgs. 27, 28). There is no dispute but that only one draft and one sum of $15,000.00 was involved.

The case went to trial on all seven counts, and none of the counts were presented to the jury as alternative counts, but were presented as seven separate offenses.

The trial judge instructed the jury on all seven counts by giving an instruction on each of the counts (Abstract pgs. 40 to 44). The jury was not instructed that Counts I and II were alternative counts, or that Counts III and IV were alternative counts, or that Counts V, VI and VII were alternative counts. Neither was the jury in-

structed that the defendant could be found guilty of only one of Counts I and II, only one of Counts III and IV, and only one of Counts V, VI and VII (Abstract pgs. 40-49).

The trial judge delivered to the jury seven separate forms of verdict, each dealing separately with each of the seven counts (Abstract pgs. 45-49).

The jury returned seven verdicts of guilty and the trial judge ordered the verdicts entered on the record and entered judgment on the seven verdicts of guilty (Abstract pgs. 54 to 56).

Thereafter the defendant filed a Motion in Arrest of Judgment or, in the alternative, for a new trial. Among other things, the Motion charged that the verdicts and judgment are void and unlawful for the reason that there was violation of Amendment V of the United States Constitution and Article II of Section 10 of the Illinois Constitution, both of which provide that no person shall be twice placed in jeopardy for the same offense (Abstract pgs. 56, 57).

The Motion was denied by the trial judge (Abstract pg. 58).

The defendant then perfected an appeal to the Illinois Supreme Court under constitutional and statutory provisions (covered later in this Petition) which provide that appeal to the Illinois Supreme Court lies as a matter of right when constitutional questions are raised. Both federal and state constitutional questions were raised in this first appeal, case number 39688 (Record B, pgs. 5, 6, 18-22 of Appellant's Brief). Both constitutional questions were argued by the State (Record B, pgs. 3, 6, 7 of the State's Brief). The Illinois Supreme Court, without opinion, but by order, transferred the case to the Appellate Court, an inferior court (Appendix A, pg. 27).

The Appellate Court affirmed the trial court, and held specifically that there were no violations of the federal and state constitutional prohibitions against double jeopardy (Appendix B, paragraph 8 of the opinion).

Defendant then filed an appeal from the Appellate Court decision, appealing to the Illinois Supreme Court under a provision of Illinois Statutes (covered later in this Petition) which grants appeal to the Supreme Court as a matter of right when the Appellate Court has passed on a federal or state constitutional question which arises for the first time (Record D, pg. 7, pgs. 5-8 of Appellant's Brief). This was case number 40209 in the Supreme Court of Illinois. At the same time defendant filed in the Supreme Court a separate appeal, designated as a Petition for Leave to Appeal. This Petition was denied, and is not referred to in this Petition for Writ of Certiorari.

On November 29, 1966, in this last appeal, the state filed a Motion to dismiss the appeal, stating that no constitutional question arose for the first time in the Appellate Court, and that the Supreme Court had transferred the first appeal to that court (Supreme Court case number 39688) (Record D, pgs. 8 to 12). This was incorrect, as will be shown in our argument.

The defendant then filed a motion to strike the State's motion to dismiss the appeal, stating that the State filed the motion to dismiss the appeal two days before serving a copy on the defendant, contrary to Supreme Court Rule 49 which requires that before a motion can be filed in the Illinois Supreme Court there must be filed proof that the opposing party has been served a copy of the motion at least 24 hours before filing in the Supreme Court. Defendant's motion shows that defendant was not served a copy of the State's motion to dismiss until two days after said motion was filed in the Supreme Court (Record D, pg. 16). This is not denied by the State.

The State's motion to dismiss the appeal shows on its face that the motion was filed in the Supreme Court before a copy was served on the defendant (Record D, pgs. 8 to 12).

By order of January 11, 1967, the Illinois Supreme Court denied defendant's motion to strike the State's motion to dismiss the appeal (Appendix C-1, pg. 35) (Record D, pg. 17).

By order of January 11, 1967, in case 40209, and without opinion but only by order, the Illinois Supreme Court dismissed defendant's appeal in this second appeal to the Illinois Supreme Court (Appendix C, pg. 34) (Record D, pg. 18).

By order of January 18, 1967, the Illinois Supreme Court ordered that the mandate be stayed until the case is disposed of on certiorari to the United States Supreme Court (Record D, pg. 22).

Before the defendant was arraigned and tried the Illinois Supreme Court, without notice to the defendant, appointed a special judge of the Supreme Court's own choice to try the case (Record E, pg. 11).

STAGE WHERE FEDERAL QUESTION WAS FIRST RAISED.

The federal constitutional questions were first raised in the trial court in the Motion in Arrest of Judgment or for a new Trial. Appendix D, pg. 36 (Abstract pgs. 56, 57) (Record D, pg. 2, pgs. 56, 57 of Abstract attached).

This motion was denied by the trial judge. Appendix D, pg. 36 (Abstract pg. 58) (Record D, pg. 2, pg. 58 of Abstract attached).

The federal constitutional questions were raised in the first appeal to the Illinois Supreme Court (Record B, pgs.

4, 5, 6, 18-22 of Appellant's Brief), and in the second appeal to that court (Record D, pg. 7, pgs. 5-9 of Appellant's Brief). They were considered and passed on by the Appellate Court (Record C, pg. 10, Appendix B, pg. 28, paragraph 8 of the opinion).

REASONS FOR GRANTING THE WRIT

There are a number of complicated points to be considered. Each will be covered briefly and concisely, concentrating chiefly on the statutes and decisions involved.

I.

The Illinois Constitution, Article VI, Section 5 (Appendix H, pg. 87) requires that appeals from the final judgments of circuit courts shall lie directly to the Illinois Supreme Court as a matter of right in cases involving a question arising under the Constitution of the United States or of the State of Illinois.

Rule 28-1 of the Illinois Supreme Court (Appendix I, pg. 38) provides that final judgments of the circuit courts shall be taken from the circuit courts to the Illinois Supreme Court in cases involving a question arising under the Constitution of the United States or of the State of Illinois.

This Petitioner, defendant below, raised the federal and state constitutional questions of double jeopardy in the trial court (Appendix D, pg. 36; Abstract, pgs. 56, 57), and the trial court held adversely on this point (Appendix D, pg. 36; Abstract pg. 58).

This petitioner urged the constitutional questions on the first appeal, this being the first appeal to the Illinois Supreme Court in case 39688, and the state argued the constitutional questions in its Brief (Record B, pgs. 5, 6, 18-22 of Appellant's Brief, pgs. 3, 4, 6-10 of State's Brief).

In none of the three appeals referred to was there any question that the appeals were not properly and timely perfected, or that the appellate rules were not followed by the Defendant-Appellant.

The Illinois Supreme Court denied the Petitioner due process and equal protection when it denied the right of direct appeal to the Supreme Court which was guaranteed by the above quoted provisions, and, without opinion, transferred the case to an inferior court, the Appellate Court (Appendix A, pg. 27).

This Court has granted certiorari, and has reversed, in cases where the right to appeal to the State Supreme Court, when established as a matter of right, has been denied a litigant: Griffin v. Illinois, 351 U. S. 12; Burns v. Ohio, 360 U. S. 252; Draper v. Washington, 372 U. S. 487; Douglas v. California, 372 U. S. 353.

In Dowd ex rel. Cook v. U. S., 340 U. S. 206, this Court stated at page 208: ". . . a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment."

The constitutional question was properly preserved in the trial court. Where a constitutional question is raised in the post trial motion in the trial court, and the trial court considers the motion, this Court has held that the constitutional question has been preserved. Williams v. Georgia, 349 U. S. 375, 383. And even where a federal question is not raised in the trial court, but is raised for the first time on appeal, the federal question is preserved. Rothschild v. Knight, 184 U. S. 334, 339; Home Insurance Co. v. Dick, 281 U. S. 397, 407.

Any state agency that denies a litigant equal protection of the law violates the Fourteenth Amendment. Cooper v. Aaron, 358 U. S. 1, 17.

A federal question decided by the state's highest court is subject to the final determination of the United States Supreme Court. Parker v. Gladden, 385 U. S. 363, 364.

II.

The Illinois Appellate Court considered and passed on the constitutional question (Appendix B, paragraph 8 of opinion). In Illinois an Appellate Court cannot lawfully pass on federal or state constitutional questions. (Illinois Constitution, Article VI, Sect. 5, Appendix H, pg. 37; Illinois Supreme Court Rule 28-1, Appendix I, pg. 38). These provisions require that federal and state constitutional questions must, as a matter of right, go to the Illinois Supreme Court.

Were federal and state constitutional questions involved? The Illinois Appellate Court, in its opinion, answered in the affirmative, and passed on the questions in the opinion (Appendix B, paragraph 8 of opinion).

III.

The second appeal to the Illinois Supreme Court, being the appeal from the Illinois Appellate Court opinion, was taken to the Supreme Court as a matter of right under the provisions of Illinois Constitution, Article 6, Section 5 (Appendix H, pg. 37) and Supreme Court Rule 32 (3) (a) (Appendix J, pg. 38), which provide that appeals from the Appellate Court lie as a matter of right where questions under the federal and state constitutions arise for the first time in and as a result of the action of the Appellate Court.

In passing on the federal and state constitutional questions the Appellate Court cited two cases, referred to below. The fact that neither of these decisions involve the question of double jeopardy as raised by this Petitioner is convincing proof that the question has never

been passed on by either the U. S. Supreme Court or the Illinois Supreme Court (Double jeopardy is argued later herein). One of the two cases relied on by the Appellate Court, People v. Friason, 22 Ill. 2d 563, 575, 177 N. E. 2d 230, 231, merely holds that jeopardy begins when the accused is arraigned and the jury impaneled and sworn. In the second case, People v. Minor, 20 Ill. 2d 496, 170 N. E. 2d 555, 556, that case merely holds that where a defendant is tried on two counts which are based on separate and distinct statutes and found guilty of the lesser offense, there is no double jeopardy.

Neither of these cases deal with the constitutional question of double jeopardy as here presented.

The briefs filed by the State in the Supreme and Appellate Courts cite no federal decisions, and cite no cases whatsoever which deal with the question of double jeopardy as presented here (Record B, pg. 3 of State's Brief).

Therefore, by failing to cite one single case in point, both the Appellate Court and the State admit that the question of double jeopardy, as presented here, has never been passed on by this Court or the Illinois Supreme Court.

This fact gave Petitioner the right to appeal to the Illinois Supreme Court as a matter of right, as provided by Supreme Court Rule 32 (3) (a) (Appendix J, pg. 38).

The Illinois Supreme Court, without opinion, dismissed the appeal from the Appellate Court, this being in the second appeal to the Supreme Court, case 40,209 (Appendix C, pg. 34). The question of the Appellate Court passing on federal and state constitutional questions which had not previously been passed on were presented and argued at length in case 40,209 (Record D, pg. 7, pgs. 5 to 9 of Brief in that case).

The Supreme Court order in case 40,209 states no reason for the order, but the judgment is summary in nature (Appendix C, pg. 34).

It is evident that the appeal as a matter of right in case 40,209 was guaranteed by Rule 32 (3) (a), and that due process was denied the Petitioner in arbitrarily denying that right (Griffin v. Illinois, 351 U. S. 12; Burns v. Ohio, 360 U. S. 252; Dowd ex rel. Cook v. U. S., 340 U. S. 206, 208).

IV.

As to the second appeal to the Illinois Supreme Court, case 40209, being the appeal from the Appellate Court as a matter of right due to passing on new federal and state constitutional questions, the state filed a motion to dismiss the appeal, stating that the Illinois Supreme Court had previously passed on the constitutional questions in case 39688 (Record D, pgs. 9-12). This is incorrect. The Supreme Court did not pass on any constitutional questions, but summarily transferred the appeal, without opinion, and giving no reason. In case 39688 the Supreme Court did not consider any constitutional questions (Appendix A, pg. 27). The denial of the right to appeal, as argued above, and dismissal of the second appeal as a matter of right, was in violation of the constitutional and statutory provisions previously referred to. Due process was denied.

This Court has held that a litigant must appeal direct to the State Supreme Court if he desires to preserve points arising under the provisions of the federal constitution, and if he appeals to the state appellate court he waives the constitutional points. Parker v. Illinois, 333 U. S. 571, 574. In the present case, the Illinois Supreme Court—the court that held as above stated in Parker v. Illinois—singles out this defendant and holds that as to this case just the opposite will be true, and transferred

case 39688 to the Appellate Court despite the constitutional question, and then, in case 40209, refused to entertain the appeal, despite the constitutional question.

V.

Rule 49 of the Illinois Supreme Court provides that before a motion **can be filed** in the Illinois Supreme Court the movant must file proof of service on the opposing party at least 24 hours **before the motion** is filed. (Appendix K, pg. 38).

After the motion to dismiss the appeal was filed, the Petitioner filed a motion to strike the State's motion, stating that the motion was filed in the Supreme Court **two days** before serving a copy on this Petitioner. (Record D, pg. 16). This the State did not deny. Despite the violation of the Rule, the Supreme Court received and acted on the Motion, and dismissed the appeal as prayed (Appendix C, pg. 34), and denied defendant's motion to strike the state's motion due to failure of the state to serve proper notice (Appendix C-1, pg. 35).

The Illinois Supreme Court, in all decided cases on the point, has dismissed motions which have been filed without giving the opposing party the required 24 hour notice. People v. Bradford, 372 Ill. 63, 22 N. E. 2d 691, 693; People v. Pamilio, 359 Ill. 609, 194 N. E. 926, 927; Hallberg v. Goldblatt Bros., 363 Ill. 25, 1 N. E. 2d 220, 221.

These cases hold that serving the 24 hour notice is jurisdictional.

Singling out this petitioner as the one to whom the Rule and the decisions will not apply denies the petitioner of due process; and equal protection requires that all persons be treated equally. Cooper v. Aaron, 358 U. S. 1, 17; Reynolds v. Sims, 377 U. S. 533, 565; Ex Parte Virginia, 100 U. S. 339, 347.

This Court has held that "engrained in our concept of due process is the requirement of notice." Lambert v. California, 355 U. S. 225, 228. Due and proper notice are necessary to satisfy the Due Process Clause of the Fourteenth Amendment, even in a civil proceeding. Walker v. City of Hutchinson, 352 U. S. 112, 115; Schroeder v. City of New York, 371 U. S. 208, 211, 212.

VI.

The Illinois Supreme Court, in pre-judging both appeals, and in deciding that the Petitioner would lose if the appeal were entertained, deprived the petitioner of the right to appeal guaranteed him by the Illinois Constitution and Illinois statutes.

This Court has held that where an appeal to the state's highest court lies as a matter of right, pre-judging the case and denying the appeal on the theory that the issues would be decided against the appellant if appeal were granted—such action cannot be an adequate substitute for the right to the full appellate review provided as a matter of right, and there has been a denial of due process and equal protection of the law. Eskridge v. Washington Prison Board, 357 U. S. 214, 216.

This record is replete with instances where this Petitioner has been singled out as one to whom constitutional guarantees and the mandates of the statutes will not apply, as to others. Truly a denial of due process and equal protection.

VII.

Double Jeopardy.

The argument in this section, for the sake of brevity, deals with Counts V, VI and VII. The same argument

will apply to the other counts which are explained in our statement of the facts.

The full context of Counts V, VI and VII of the indictment is set forth in Appendix L, pg. 39, in order that the Court may conveniently see that those counts were not pleaded as alternative counts, but as cumulative and multiple charges for the same offense. These counts charge a violation of the same statute through the same act, and involving the same property and the same owner. In the instructions the trial judge submitted all three counts to the jury as three separate acts, and without indicating that they were alternative counts, and without instructing the jury that the defendant (Petitioner here) could be found guilty on only one of the counts (Record D, pg. 2, pgs. 42-44 of Abstract attached to record; pgs. 42-44 of Abstract on file in this Court).

The trial judge delivered forms of verdict to the jurors which stated each of these counts as separate and distinct acts and offenses, without instructing the jury that the defendant could be found guilty on only one of the three counts (Record D, pg. 2, pgs. 45-49 of Abstract attached to record; pgs. 45-49 of Abstract on file in this Court).

The three counts are identical in all respects, with slight variation in language—the typical "shotgun approach".

The sum involved is $15,000.00, as indicated by the state's exhibit of the draft (Record D, pg. 12, pgs. 27, 28 of Abstract attached to Record D. Also pgs. 27, 28 of Abstract on file in this Court).

The three counts and the three verdicts delivered to the jury by the judge falsely accuse the defendant of the theft of three times that amount, or $45,000.00.

The jury, being so misled, returned the three verdicts of guilty, falsely finding the defendant guilty of the

theft of $45,000.00, and the trial judge readily entered the falsehood on the court records (Record D, pg. 2, pg. 56 of Abstract attached to Record D. Also pg. 56 of Abstract on file in this Court).

The question could be quickly disposed of by making the obvious observation that there was a deprivation of the fundamental fairness required by due process, for a trial judge deprives a defendant of due process when he speaks falsehoods in the instructions and the forms of verdict which he delivers to the jurors. First, however, we desire to cite authorities on the point of double jeopardy.

The sentence pronounced, which we will refer to later, is immaterial. The constitutional prohibition against double jeopardy is not merely a guarantee against double punishment, but guarantees against twice (thrice here) being put in jeopardy. U. S. v. Ball, 163 U. S. 662, 669.

"The prohibition is not against being twice punished, but against being twice put in jeopardy." Quoted from Kepner v. U. S., 195 U. S. 100, 129.

The constitutional prohibition against double jeopardy was designed to protect an individual from being **subjected to the hazard of conviction** more than once for the same offense. Green v. U. S., 355 U. S. 184, 187. That is exactly what happened here. The defendant was not only subjected to the hazard of conviction more than once for the same offense, but he was in fact convicted more than once for the same offense—and with the blessing of the trial judge who entered the verdicts.

The Illinois Supreme Court adheres to the principle stated, as indicated by the language of that court in People v. Allen, 368 Ill. 368, 14 N. E. 2d 397, 405, where, at pg. 405 (N. E. 2d) the court stated that the constitutional provision against double jeopardy has for its objective

that no one should be brought in danger of punishment for the same offense more than once; that it is the identity of the offense, and not the act, which is referred to in the constitutional guarantee.

Further in point is Bartkus v. Illinois, 359 U. S. 121, where, in dissenting opinions at pg. 150, the Chief Justice and Justices Black and Douglas stated that double prosecutions for the same offense are contrary to the spirit of our free country and violative of the Fourteenth Amendment.

There was a triple prosecution in the present case.

Also in point in U. S. v. Ewell, 383 U. S. 116. The concurring opinion of Mr. Justice Brennan (pg. 125), is critical of the government's tactics in increasing the pressure on the defendant to plead guilty in order to avoid cumulative sentences. And in the dissenting opinion (pg. 128) the Justices are critical of the government's action in discouraging a defendant from exercising his rights, and they are critical of the act of the government in multiplying (as was done here) the charges for adverse reasons.

The constitutional violation rendered the judgment and sentence void. Where a sentence is contrary to the express provisions of the Constitution, there is no jurisdiction to enter the sentence, and the sentence is void. Re Nielsen, 131 U. S. 176, 185. In the present case the sentence encompassed the three verdicts—verdicts replete with falsehood in falsely finding the defendant guilty of the theft of three times the amount charged, and a sentence based on false verdicts. This falls within the doctrine of Re Nielsen.

In Re Snow, 120 U. S. 274, 282, comments on the action of breaking up an offense into parts and entering judgment on all of the parts, and called the action arbitrary and ordered habeas corpus to issue.

The penalty for theft in Illinois is from one to ten years. This defendant was sentenced to from three to ten years. It is reasonable to say that the theft statute, on which Counts V, VI and VII were based, was broken up into three parts, although only one offense was allegedly committed, and judgment was entered on all the parts in violation of the doctrine of Snow, cited above.

Jeopardy commenced the instant the defendant was put to trial before the jury. Green v. U. S., 355 U. S. 184, 188; Kepner v. U. S., 195 U. S. 100, 128.

Illinois so holds, People v. Friason, 22 Ill. 2d 563, 177 N. E. 2d 230, 231; People v. Watson, 394 Ill. 177, 180, 68 N. E. 265.

Where the same evidence will prove any one of the multiple counts, and no additional element is required, there is but one offense. Blockburger v. U. S., 284 U. S. 299; Morgan v. Devine, 237 U. S. 632, 641.

VIII.

The Error Was Not Harmless.

The prejudice claimed to have resulted from the pretrial publicity in Estes v. Texas, 381 U. S. 532, and Sheppard v. Maxwell, 384 U. S. 333, which publicity occurred months before the trial, and where there was only a possibility of prejudice, did not compare with the prejudice here, where the court in effect told the jury that they could find the defendant guilty of the theft of $15,000.00 three times, or the theft of $45,000.00—advising the jury that the defendant could be found guilty of being a multiple criminal.

This Court has granted certiorari, and has reversed, where the government has contended that the constitutional violation was harmless error, and has held that the error cannot be harmless if there is a reasonable possi-

bility that the constitutional violation complained of might have contributed to the conviction. Chapman v. California, ... U. S. ..., 87 S. Ct. 824, 827, 828; Griffin v. California, 380 U. S. 609.

In Fahy v. Connecticut, 375 U. S. 85, 86, it was held that the erroneous admission of unconstitutional evidence was prejudiced and that the error was not harmless.

This Court held in Payne v. Arkansas, 356 U. S. 560, 568, that no one can say what credit and weight the jury gave to that part of the proceeding that violated the Constitution (in that case admission of an involuntary confession).

This Court has further held that even where there may have been sufficient evidence to convict the defendant, if there was a violation of a constitutional provision during the course of the trial which was substantial, such violation vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment. Payne v. Arkansas, 356 U. S. 560, 568; Malinski v. New York, 324 U. S. 401, 404; Lyons v. Oklahoma, 322 U. S. 596, 597; Watts v. Indiana, 338 U. S. 49, 50; Chapman v. California, ... U. S. ..., 87 S. Ct. 824, 827, 828.

The act of the trial judge in presenting instructions and forms of verdict which falsely accuse the defendant (Petitioner here) of the theft of $15,000.00 on three separate and distinct occasions is far worse than the wrong which has resulted in cases where there has been a conviction where there was evidence known by the prosecution to be false, for the jury will obviously be more influenced by the judge and his instructions than by the testimony of a witness.

This Court has held that the introduction of testimony known by the prosecution to be false deprives the defendant of a fair trial. Miller v. Pate, ... U. S. ..., 87 S. Ct. 785, 788; Napue v. Illinois, 360 U. S. 264, 269; Pyle v.

Kansas, 317 U. S. 213, 216; Alcorta v. Texas, 355 U. S. 28; Mooney v. Holohan, 294 U. S. 103, 112. It is elementary that the court's instructions should speak the truth, and that prejudicial error is present when they speak falsehoods.

IX.

Due Process.

The points previously made will serve as proof that the petitioner was deprived of due process. Brief reference will be made to further authorities.

Where there is a strong probability that prejudice will result from error or prejudicial conduct during the trial, due process is inherently lacking. Parker v. Gladden, 385 U. S. 363, 365; Estes v. Texas, 381 U. S. 532, 542, 543.

"Appeals to the passion and prejudice may so poison the minds of the jurors even in a strong case that an accused may be deprived of a fair trial." U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150, 240.

The action of the Illinois Supreme Court in appointing a foreign judge of its own choice without any notice to the defendant (Record E, pg. 11), the inflaming of the jury in telling them from the bench that the defendant could be found guilty of multiple offenses as to Counts V, VI and VII, where only one offense was in issue, and the resulting prejudice—all of these things point to a deprivation of a fair trial and due process.

X.

Certiorari Has Been Granted in Less Serious Cases.

Certiorari has been granted by this Court in cases where the double jeopardy was less obvious and far less prejudicial. Brief references on this point are as follows:

Where there was but one act, but two or more separate statutes containing different elements were violated. Bartkus v. Illinois, 359 U. S. 121; Abbate v. U. S., 359 U. S. 187.

Where there was a second trial after a mistrial or remand for a new trial. U. S. v. Tateo, 377 U. S. 463; Downum v. U. S., 372 U. S. 734, where it was held that there was double jeopardy.

Where there was one act but multiple victims of the act. Hoag v. New Jersey, 356 U. S. 464; Ciucci v. Illinois, 356 U. S. 571.

Where defendant was prosecuted for two separate offenses which were closely related, and involved separate statutes. Gore v. U. S., 357 U. S. 386; U. S. v. Ewell, 383 U. S. 116; Yancy v. U. S., 362 U. S. 389.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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